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IN THE

SUPREME COURT OF THE UNITED STATES

No. [redacted]100

1962

MILTON J. HARRIS
Appellant,

versus

THE FLORIDA REAL ESTATE COMMISSION,
a Statutory Commission under the Laws of the
State of Florida, et al.,
Appellees,

APPEAL FROM THE SUPREME COURT
OF FLORIDA

APPELLEES' MOTION TO DISMISS OR AFFIRM

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IN THE

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THE FLORIDA REAL ESTATE COMMISSION,
a Statutory Commission under the Laws of the
State of Florida, et al.,
Appellees,

APPEAL FROM THE SUPREME COURT
OF FLORIDA

MOTION OF APPELLEE TO DISMISS APPEAL OR AFFIRM

The Appellee, Florida Real Estate Commission, pursuant to Rule 16, Revised Rules of the Supreme Court of the United States, moves this Honorable Court to dismiss the appeal in the above entitled case on the grounds that: (a) the appeal does not present a substantial Federal question; (b) the Judgment and Order appealed from rests on an adequate non-Federal basis; and (c) the Federal questions, if any, were not timely raised.

The Appellee further moves this Honorable Court, in the alternative, as to the appeal from the order of the Supreme Court of Florida, to affirm on the grounds that it is manifest that the questions on which the decision of the cause (the Order denying Petition to recall mandate) are so unsubstantial as not to need further argument.

APPENDIX

There is appended hereto a copy of the petition to recall the mandate of the Supreme Court of Florida. Other items necessary for the Court's consideration of these Motions affirmatively appear in the decision appealed from which is set forth in its entirety in Appellant's Appendix.

STATEMENT OF THE CASE

This case includes: (a) an appeal from a final decision of the Supreme Court of the State of Florida reversing a Final Decree entered by the Circuit Court of the Eleventh Judicial Circuit, Dade County, Florida, with directions to dismiss the complaint; and (b) an appeal from an Order of the Supreme Court of Florida denying a Petition to recall the mandate issued pursuant to the final decision mentioned above.

This case is the culmination of a series of cases which, for the sake of clarity, are briefly recited as follows:

Case No. 1. *Joseph Condermann*, Plaintiff, vs. *Milton J. Harris*, Defendant, Progress Docket No. 998, before the Florida Real Estate Commission. This case was an administrative proceeding terminating in an Order entered the 18th day of June, 1958, revoking the Defendant's real estate broker's registration upon the ground that the Defendant had violated the

provisions of Section 475.25(2), Florida Statutes, by reason of his confinement in a Federal prison.

Case No. 2. *Milton J. Harris*, Petitioner, vs. *Joseph Condermann* and the *Florida Real Estate Commission*, Respondents, CVA 1901, before the Circuit Court, Dade County, Florida. This case presented a Petition for Certiorari to review the Order of the Florida Real Estate Commission noted in Case No. 1. Certiorari was denied on the 12th day of December, 1958. The opinion and Order of the Court is recited in full in the decision of the Supreme Court of Florida now on appeal.

Case No. 3. *Milton J. Harris*, Petitioner, vs. *Joseph Condermann* and the Florida Real Estate Commission, Respondents, Case No. 59-230, before the District Court of Appeals, Third Appellate District of Florida. This case was an abortive attempt to have the District Court of Appeals review by Certiorari the Order of the Circuit Court denying certiorari. The Petition was dismissed sua sponte by Order dated the 29th day of April, 1959. Rehearing was denied with opinion June 9, 1959. This case is reported at 113 So. 2d 235.

Case No. 4. *Milton J. Harris*, Petitioner, vs. *Joseph Condermann* and the *Florida Real Estate Commission*, before the Supreme Court of Florida. This case sought the review by Certiorari of the sua sponte dismissal Order and denial of Petition for rehearing entered by the District Court of Appeal. Certiorari was denied without opinion on the 20th day of October, 1959. This case is reported at 117 So. 2d 495.

Case No. 5. *Milton J. Harris*, Plaintiff, vs. the *Florida Real Estate Commission*, et al., Defendants, 59C11355, before the Circuit Court, Dade County, Florida. This case presented a complaint for injunctive relief seeking to enjoin the enforcement of the Order of revocation entered by the Florida Real Estate Commission. The complaint was filed and temporary injunction issued on the 30th day of November, 1959. Final decree was entered on the 11th day of July, 1960, holding Section 475.25(2), Florida Statutes, unconstitutional, after the Court had denied Defendants' Motions to Dissolve the Temporary Injunction and to Dismiss the Complaint.

Case No. 6. *The Florida Real Estate Commission*, Appellant, vs. *Milton J. Harris*, Appellee, Case No. 31,102, before the Supreme Court of Florida. This case was an appeal from the final decree and Orders entered by the Circuit Court in Case No. 5, above. On October 25, 1961, the Court entered its decision reversing the Circuit Court with directions to dismiss the complaint. This opinion is reported at 134 So. 2d 785. On the 25th day of January, 1962, Appellee filed a Petition to recall the mandate which had issued. On February 6, 1962, said Petition was denied. This case is now presented to the Supreme Court of the United States in an attempt to obtain review of the decisions of the Supreme Court of Florida.

QUESTIONS PRESENTED BY APPELLANT

The Notice of Appeal and Jurisdictional Statement presents two questions. Question No. 1, as stated by the

Appellant, seeks to have this Court determine the constitutionality of Section 475.25(2), Florida Statutes, upon two grounds, namely: (a) Is the Statute discriminatory and a denial of due process; and (b) Is the Statute an unconstitutional delegation of legislative authority. Question No. 2, as stated by the Appellant, seeks to have this Court determine the validity of the Order of the Supreme Court of Florida denying the Petition to recall its mandate upon the ground that the same was a denial of due process.

ARGUMENT

The Appellee respectfully submits that the decision of the Supreme Court of the State of Florida rests solely upon the question of whether the cause of action in Circuit Court Case No. 5, recited above, was barred by reason of its prior adjudication in Circuit Court Case No. 2, recited above.

The language of the State Court makes it abundantly clear that the Court declined to decide any of the constitutional questions (State or Federal) which may have been presented.

Under the decisions of the Supreme Court of the United States, it has been often and repeatedly held that a State Court decision upon the question of prior adjudication in a state court is not only final, but as well, binding upon the Supreme Court of the United States, and that an appeal from the state court to review such a decision presents no Federal question.

These principles were stated by this Honorable Court in the case of *Charles P. Chouteau and Julia Maffit* vs. *Charles Gibson*, 111 U.S. 200, 28 L. Ed. 400, and have

been consistently followed. Said case presented to this Court the very question involved in the case at Bar. That is, it was an appeal to review a decision of a State Supreme Court (Missouri) holding a state court proceeding barred by prior adjudication. The appeal was dismissed upon Appellee's Motion.

The language of Mr. Chief Justice Waite in that case more than adequately summarizes the Appellee's contention in the case at Bar in the following manner:

> "The court below has decided that the pleadings were sufficient; that the equitable defense could be made, and that the judgment in that action in favor of Gibson was, in its legal effect, a judgment that Chouteau and Maffit had no title to the land in controversy. Consequently, that judgment was a bar to this action and precluded the court below as well as this court from re-opening the original litigation, and considering again the questions that were put at rest between the parties by the decision in their former suit. It is apparent, therefore, that no federal question which there may have been in the case was decided by the state court, and that the decision of such a question was not necessary to the final decree rendered."

In the case at Bar, the Supreme Court of the State of Florida passed directly upon the jurisdiction of the Circuit Court in Case No. 2, recited hereinbefore; the sufficiency of the pleadings; and the judgment. It determined that Case No. 2, laid to rest all questions which were presented and which could have been presented and that by reason thereof Case No. 5 was barred.

The Federal questions submitted by Appellant as to the constitutionality of Section 475.25(2), Florida Statutes, were laid to rest in Case No. 2; could not be reached in

Case No. 5, and it was decided in the case at Bar by the Supreme Court of Florida.

The lack of jurisdiction of this Honorable Court, under the circumstances, was decided also in the cases of: *City and County of San Francisco* vs. *Andrew J. Itsell*, 133 U. S. 65, 33 L. Ed. 570, citing the Chouteau case, supra, and *People of the State of California ex rel: Bryant* vs. *S. W. Holladay et al.*, 159 U. S. 415, 40 L. Ed. 202, and in each of these cases the appeal from such a decision of a state court was dismissed.

Appellee would make but one further comment respecting the matters set forth in Appellant's jurisdictional statement. That is, the lower court's decision was not "split" upon the question of res judicata. It was instead "split" upon disposition, once res judicata had been determined.

The Appellee respectfully submits that Question No. 2, as stated by the Appellant, is presented for the first time by the Notice of Appeal and the jurisdictional statement in this court. The question was not presented to the Supreme Court of Florida by the Petition or otherwise.

Appellee's Appendix "A" sets forth said Petition to recall the mandate in its entirety from which, in view of the order entered, it affirmatively appears that the question was not raised, or passed upon by the Supreme Court of the State of Florida.

It further affirmatively appears from the Petition and Order that the Supreme Court of Florida was called upon to do nothing more than decide whether procedural aspects of the case were sufficient under rules of Appellate

procedure adopted by the Court itself. Such a question has since the "beginning" been within the exclusive province of the state courts.

Not only is there a complete absence of a Federal question, but the decision of the state court upon such a manner is binding upon this Honorable Court, and the decision could have rested upon any one of several state questions. See *Seaboard Airline Railroad Company* vs. *Henry M. Holt*, 80 So. 2d 354, *Continental National Building and Loan Association, et al.* vs. *Miller et al.*, 26 So. 725. See also *Durley* vs. *Mayo*, 76 S. Ct. 806, 351 U. S. 277, 100 L. Ed. 1178.

It has been repeatedly decided by this Court that a state court's determination of its jurisdiction and procedures is binding on this Court. See *Wolfe* vs. *North Carolina*, 364 U. S. 177, 4 L. Ed. 2d 1650, 80 S. Ct. 1482, and cases cited therein.

Since no Federal question was presented, it must be presumed the decision rested on state law.

However, should this Honorable Court take the view that the question of due process as stated by the Appellant in Question No. 2 has been timely and properly raised and does present a Federal question, notwithstanding the foregoing, then the Appellee respectfully submits that the existence of the fundamentals of due process resolved by this Court in its many decisions on the subject are so patently manifest from arguments of Appellant and the recitations in the decision of the Supreme Court of Florida as to render the question completely devoid of merit.

Appellant wholly fails to set forth, directly or by im-

plication any fundamental omission so far as the requisites of due process are concerned. None is even alleged.

For this reason, it is respectfully submitted that the question as presented should not be dignified by the deliberations of this Honorable Court, and at the very most, so far as the contentions of Appellant are concerned, should be affirmed.

CONCLUSION

This Court lacks, or will not assume, jurisdiction to review a state court decision upon the question whether a cause is res judicata in a prior state action since no Federal question is presented thereby. Such Federal questions, if any, as may have existed lay behind the defense of res judicata and can not be reopened or considered by the Court. The Order denying the petition to recall the mandate involved no Federal question which was timely raised or presented, and rested or could have rested on state law alone. The appeal should be dismissed.

The question of due process of law allegedly presented by the Order denying the petition to recall the mandate is so manifestly unsubstantial as to need no further argument. The appeal, if not dismissed, should be affirmed.

Respectfully submitted,

BENJAMIN T. SHUMAN
General Counsel
Florida Real Estate Commission
State Office Building
West Morse Boulevard
Winter Park, Florida
Attorney for Appellees

CERTIFICATE OF MAILING

I, Benjamin T. Shuman, Attorney for Appellees, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of May, 1962, I served copies of the foregoing Appellees' Motion to Dismiss or Affirm, together with the Appendix thereto, by mailing said copies in a duly addressed envelope with sufficient United States Air Mail postage prepaid to: Burton B. Loebl, 1880 N. E. 170th Street; North Miami Beach, Florida, and M. H. Rosenhouse and D. L. Rosenhouse, in care of Rosenhouse & Rosenhouse, 910 Olympia Building, Miami, Florida, Attorneys for Appellant, and deposited the same in a United States Post Office or mail box at Winter Park, Florida, on said day.

BENJAMIN T. SHUMAN
General Counsel
Florida Real Estate Commission
State Office Building
West Morse Boulevard
Winter Park, Florida
Attorney for Appellees

APPELLEE'S MOTION TO RECALL THE MANDATE OF THE SUPREME COURT OF FLORIDA

(Formal parts omitted)

* * * * *

The Appellee, *Milton J. Harris*, in the above entitled cause, moves this Honorable Court to recall its mandate therein to the Circuit Court of Dade County, Florida, and to dismiss the Appellants' purported appeal filed herein on the ground that Appellents' purported appeal violated the mandatory provisions of the Florida Appellate Rule 3.2(c) and was insufficient to give this Court jurisdiction to pass upon the purported appeal in that the Notice of Appeal did not contain, nor did any subsequent papers such as the directions to the Clerk and Assignments of Error contain the title of the Court to which the appeal is taken, and failed to contain and entirely omitted any title of any Court to which such appeal was taken (although the Appellants had the choice of appealing to more than one Court).

For the convenience of this Honorable Court a true copy of the purported Notice of Appeal is attached to this Motion and marked EXHIBIT 1.

Appellee further states:

(a) That this Notice of Appeal was, and is not sufficient to give this Court jurisdiction of said purported appeal.

(b) That Section (c) of Rule 3.2 of Florida Appellate Rules mandatorially requires that a Notice of Appeal

contain the title of the Court to which the appeal is taken "shall state . . . the title of the Court to which the appeal is taken." (underscoring supplied)

(c) That under Rule 3.2(c) the Notice of Appeal *may* be in the form approved by the Court but that the form of the Notice approved by this Court, Appellate Rule 7.2 follows the mandatory provisions of Appellate Rule 3.2(c) by providing "that he enters his appeal to the _____ Court of Florida to review the order, judgment or decree etc." That the said mandatory provision of Rule 3.2 being jurisdictional, cannot be waived.

(d) That the entire failure to set out to what court, or for that matter any court the Final Decree was appealed to was not in substantial compliance with the Rules and being jurisdictional, the failure to file a Motion to Dismiss within the prescribed time cannot waive the defect or omission, nor does the filing of a brief by Appellee create a waiver.

(e) That an Appeal from the Final Decree of the Circuit Court could be either to the District Court of Appeal or to the Supreme Court of Florida, but the said Notice which entirely omits to set forth to what court (any court) the appeal was taken, did not give to the Appellee, or to this Court, information to which Court the Appeal was taken, and surely no one could glean from the purported Notice of Appeal that the Appeal was taken directly to the Supreme Court of Florida, pursuant to Article 5, Sec. 4(2) Constitution of the State of Florida F S A, and Rule 2.1 Sub. (a) (5) (a) Florida Appellate Rules 31 F S A.

WHEREFORE, it is respectfully submitted that this Court on a hearing had in accordance with its Rules, re-

call the Mandate in the above entitled cause, set aside its Order of Reversal, and dismiss the Appellants' purported appeal because this Honorable Court had no jurisdiction to entertain the appeal.

Respectfully Submitted,

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BY s/ M. H. Rosenhouse
M. H. ROSENHOUSE
Of Counsel

I HEREBY CERTIFY that a copy of the above and foregoing Motion was mailed to: Honorable Benjamin T. Shuman, General Counsel, Florida Real Estate Commission, Florida Office Building, West Morse Boulevard, Winter Park, Florida, on this the 25 day of JANUARY, 1962.

s/ MHR
OF COUNSEL